93-845

No.

Supreme Court, U.S.
FILED
NOV 22 1993
OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

FOUAD A. MIKHAIL,
Petitioner,
vs.
WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, U.S. MARINE CORPS EXCHANGE; GAB BUSINESS SERVICES,
Respondent.

PETITION FOR WRIT OF CERTIORARI

GEORGE & WALTEMADE
770 THE CITY DRIVE SOUTH
SUITE 3000
ORANGE, CALIFORNIA 92668
(714) 740-2009
Counsel for Petitioner

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

QUESTION PRESENTED

The single question presented by this case is whether a State may apply its Workers' Compensation scheme to injuries that fall within the coverage of the Federal Non-Appropriated Funds Instrumentalities (NAFI) ACT. 5 USC 8171 et. seq.

PARTIES BELOW

The following were parties to the proceedings in the California Supreme Court the court whose judgment is sought to be reviewed:

Fouad A. Mikhail
1514 S. Oak St.
Santa Ana, CA 92707

Workers' Compensation Appeals Board
State of California
455 Golden Gate Avenue
San Francisco, CA 94102

United States Marine Corps Exchange
MWR 0230
P.O. Box 5010
El Toro, CA 92630

GAB Business Services
9370 Skypark CT, #140
San Diego, CA 92134

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APP. C: California State Court of Appeal, Fourth Appellate District, order July 8, 1993 denying Petition for a Writ of Review.

APP. D: Opinion and Order Denying Petition for Reconsideration dated June 1, 1993.

APP. E: Findings of Fact and Minutes of Hearing and Summary of Evidence dated March 15, 1993.

APP. F: California State Workers' Compensation Appeals Board Application for Adjudication of Claim dated June 6, 1989.

APP. G: Petition to Dismiss for Lack of Jurisdiction dated June 16, 1989.

APP. H: Trial Memorandum Re: Jurisdiction of California State Workers' Compensation Appeals Board dated October 27, 1992.

No. _____

In the Supreme Court

OF THE

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OCTOBER TERM, 1993

FOUAD A. MIKHAIL,
Petitioner,
VS.
WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, U.S. MARINE CORPS EXCHANGE; GAB BUSINESS SERVICES,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner Fouad A. Mikhail respectfully requests that a writ of certiorari issue to review the order of the California Supreme Court in this case.

I

OPINION BELOW

The California Supreme Court final order of August 25, 1993 denying Petition for review is at Appendix B. The California State Court of Appeal, Fourth Appellate District, Order of July 8, 1993 denying Petition for a Writ of Review is at Appendix C. The California State Workers' Compensation Appeals Board Opinion and Order Denying Petition for Reconsideration of June 1, 1993 denying Reconsideration is at Appendix D. The California State Workers' Compensation Appeals Board Trial Court March 15, 1993 Findings of Fact and Minutes of Hearing and Summary of Evidence finding exclusive federal Jurisdiction is at Appendix E.

II

GROUNDS FOR JURISDICTION

(A) Date of entry of judgment of the decree sought to be reviewed: August 25, 1993.

(B) Statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari: *28 U.S.C. 1257.*

III

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions, the text of which are contained in Appendix A.

5 USC 2105(c)
5 USC 8171
5 USC 8173
28 USC 1257(a)
33 USC 901
33 USC 905(a)
40 USC 290
California Labor Ccde Section 3209
California Labor Code Section 3602

IV

STATEMENT OF THE CASE:

On May 13, 1988, petition Fouad A. Mikhail, an employee of the United States Marine Corps Exchange, El Toro, California, a Federal Non-Appropriated Fund Instrumentality (NAFI) employee, claimed injury at the Exchange in El Toro, California. He filed a claim, Appendix F, under the California State Workers' Compensation scheme, based on a theory of concurrent California jurisdiction with the federal NAFI workers' compensation provisions, 5 USC 8171 et. seq. The federal question of whether State

concurrent jurisdiction was preempted by NAFI Act was raised immediately by defendant Exchange's first response to the state claim, which was a June 16, 1989. Petition to Dismiss the claim, Appendix G, based on contention that NAFI Act jurisdiction is exclusive and preempts any application of California Workers' Compensation laws. Part IV, page four of said petition recites: "Under the Non-Appropriated Fund Instrumentalities Act and the Decisions of the California Courts, federal jurisdiction in this matter is exclusive and California's Workers' Compensation Laws may not be applied."

Petitioner's trial Memorandum, Appendix H, of October 27, 1992, page two, responded that the language of NAFI only extended federal exclusivity to state workers' compensation schemes that provided "damages," as contrasted to "compensation," as a remedy, and that since California workers' compensation scheme eliminates damages as a remedy, California may exercise concurrent jurisdiction. Thus the federal question was joined at the earliest stage of the case.

Indeed, the sole issue framed, tried and decided by the California workers' compensation Judge at the trial of this matter on December 11, 1992, was the exclusivity of federal jurisdiction question, against petitioner. Findings of Fact, Appendix E (page 1) March 15, 1993: "It is hereby found that pursuant to the provisions of NAFI, 5 USC 8171 et. seq. Congress has provided that liability under the act is exclusive. Therefore, this Board lacks jurisdiction in the above entitled matter."

That decision was appealed administratively by Petition for Reconsideration to the California Workers' Compensation Appeals Board; by Petition for Writ of Review to the California Court of Appeal; and by Petition for a Hearing with the California Supreme Court, all of which declined to reverse or review the trial judge's decision on exclusivity of federal jurisdiction. The Workers' Compensation Appeals Board decision, the Court of Appeals Decision and the California Supreme Court Decision are Appendix D, C and B respectively.

V

ARGUMENT: REASONS FOR GRANTING CERTIORARI

The writ is sought pursuant to Rules of Supreme Court Rule 10.1(c), in that a state court has decided an important question of federal law which has not been, but should be, settled by this court. That important question of federal law concerns whether States, such as California, which have established workers' compensation schemes which eliminate the remedy of "damages," may exercise concurrent jurisdiction over injuries within the state to NAFI employees, when the NAFI Act 5 USC 8173 provides that its "liability is exclusive and instead of all other liability of the United States or the instrumentality to the employees . . . and any other person otherwise entitled to recover *damages* from the United States or the instrumentality . . . under a workers' compensation statute." (emphasis added).

The NAFI Act workers' compensation provisions were enacted in 1958 by Congress to assure that NAFI employees had some workers' compensation coverage. The legislative history suggests that some state courts were declining to hear such cases. The Senate Post Office and Civil Service Committee report on the bill states:

> "The law provides that such employees (NAF) shall not be held and considered as employees of the United States for the purpose of the Federal Employees Compensation Act." Ordinarily, in these circumstances, the claims of such employees would be adjudicated by the State Compensation commissions. However, the State compensation commissions have declined jurisdiction on the ground that such employees are employed by instrumentalities of the Federal Government" (U.S. code Congressional and Administrative News, Legislative History, 85th Congress, 1958, page 3085.)

However, while some state courts may have been declining to hear such cases, others were hearing them. *Rizzuto vs. U.S.*, 298 F2d 748 (1961), footnote 7, reveals that cases involving NAFI employees were adjudicated in Wyoming courts, with the NAFI law in effect prior to the present statute. Additionally, 40

USC 290 extends jurisdiction of state workers' compensation to federal reservations, such as the El Toro base:

> Whatsoever constituted authority of each of the several states is charged with the enforcement of requiring compliances with the state workers' compensation laws of said states and with enforcement of and requiring compliances with the orders, decisions and awards of said constituted authority of said states shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, building, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any state, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the state with whose exterior boundaries such place may be.
>
> For the purpose set out in this section the United States of America vests in the several states within whose exterior boundaries such place may be, insofar as the enforcement of state workers' compensation laws are effected, the right, power, and authority aforesaid: Provided, however, that by the passage of this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several states within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their state workmens' compensation laws as herein designated: Provided further, that nothing in this Act shall be construed to modify or amend sections 751-756, 757-781, 783-791 and 793 of Title 5 [United States Employees' Compensation Act]. (As amended June 25, 1936, c. 822, SSI 2 49 Stat. 1938, 1939.)

What the interplay of these statutes presents this court with is that the key to a finding that California may exercise concurrent jurisdiction is the term "damages." Any injured worker with a California workers' compensation case has had to endure his attorney's lecture about the abolition of "damages" and the substitution therefor of "compensation" under the California

workers' compensation system, California Labor Code Section 3602, and has learned the bitter lesson that both "damages" and "compensation" are terms of art.

Key elements of "damages" are lost earnings, projected lost future earnings, and pain and suffering; all of which are wiped out by California workers' "compensation".

NAFI Act 5 USC 8173 specifically and solely provides that it is exclusive and instead of liability for "damages". The California workers' compensation act Labor Code Section 3209 defines "damages" and contrasts it with the totally different concept of "compensation": "Section 3209. Damages." "Damages means the recovery allowed in an action at law as contrasted with compensation." Labor Code Section 3602 then specifically excludes any claim for "damages" against an employer, and provides that "compensation" is the sole remedy.

Moreover, 33 USC Section 905(a) of the Longshore & Harbor Workers' Compensation act, which NAFI act incorporates, uses both the words "compensation" and "damages" in a manner that makes it absolutely clear that they are totally different concepts:

> The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband, or wife, parents, dependants, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death.

This statutory analysis demonstrates that this court should rule that States which have eliminated damages as a remedy in their workers' compensation schemes may exercise concurrent jurisdiction over work injuries to NAFI employees on federal reservations such as El Toro.

In further support of such a ruling is the case of *Sun Ship vs. Pennsylvania,* 447 US 715, 100 S.Ct. 2432, 65 L.Ed.2nd 458 (1980). At page 716, that case posed the identical question to the question herein, and ruled to allow concurrent state jurisdiction with the Longshore & Harborworkers' Compensation Act, 33 USC 901 et.seq., for land based injuries. The Sun Ship issue arose when the Longshore & Harborworkers' Act was amended in 1972 to provide Longshore & Harborworkers jurisdiction of certain land based injuries.

There are strong policy statements involving the concept of federalism in *Sun Ship* to favor allowance of concurrent state jurisdiction in NAFI cases. The court in Sun Ship stated:

> If state remedies schemes are more generous than federal law, concurrent jurisdiction could result in more favorable awards for workers' injuries than under an exclusively federal compensation system. But we find no evidence that Congress was concerned about a disparity between adequate federal benefits and superior state benefits. Rather, it seems that the quid pro quo to the employers for the landward extension of the LHWCA by the 1972 amendments was simply abolition of the longshoremen's unseaworthiness remedy. See S. Rep. No. 92-1125, supra, at 4-5; H.R. Rep. No. 92-1441, supra, at 1; Northwest Marine Terminal Co. vs. Caputo, supra, at 261-262. Indeed, it is noteworthy that in their discussion of advantages to employers under the 1972 amendments, the bill Reports dwell upon the rejection of the unseaworthiness action, and do not mention pre-emption of state remedies.

"Unseaworthiness" is a reference to a "damages" remedy. The elimination of unseaworthiness in L&H, and the reference to "damages" in the NAFI Act should be seen as more than coincidental, and reinforce the argument that only state schemes involving damages were being preempted by NAFI Act.

The question of the fostering of federalism is also relevant. California has more liberal medical-legal and vocational rehabilitation provisions under its workers' compensation scheme. Under these rules, some employees will win cases under California scheme that would lose them under NAFI Act exclusivity.

California should be permitted to exercise jurisdiction because it has an interest in seeing such workers compensated industrially and not become public charges of California.

VI

CONCLUSION

In light of the policy of furthering federalism inherent in the decision in *Sun Ship*, combined with the restriction of the NAFI Act exclusivity language to "damages," the language of 40 USC 290 and the abolition of "damages" under the California workers' compensation scheme, this court should grant a Writ of Certiorari to consider whether under such circumstances, States have concurrent workers' compensation jurisdiction for NAFI employee injuries. Certainly 40 USC 290 places NAFI employees in virtually identical jurisdictional circumstances to longshore employees involved in land based injuries, and accordingly, consistency and fairness would dictate application of the Sun Ship rule of allowing concurrent State jurisdiction to NAFI employee injuries.

Respectfully submitted,

GEORGE & WALTEMADE

BY: FRED W. WALTEMADE, ESQ.

DATED: NOVEMBER 22, 1993

APPENDIX A-1

5 USC 2105(c)

§ 2105.

(c) An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of —

(1) laws (other than supchapter IV of chapter 53 and sections 5550 and 7204 of this title) administered by the Office of Personnel Management; or

(2) subchapter I of chapter 81, chapter 84, [Federal Employee's Compensation Act] and section 7902 of this title.

This subsection does not affect the status of these nonappropriated fund activities as Federal instrumentalities.

§ 8171.

(a) Chapter 18 of title 33 [Longshoremen's and Harbor Workers' Compensation Act] applies with respect to disability or death resulting from injury, as defined by section 902(2) of title 33, occurring to an employee of a nonappropriated fund instrumentality described by section 2105(c) of this title who is —

(1) a United States citizen or a permanent resident of the United States or a territory or possession of the United States employed outside the continental United States; or

(2) employed inside the continental United States.

However, that part of section 903(a) of title 33 which follows the first comma does not apply to such an employee.

(b) for the purpose of this subchapter, the term "employer" in section 902(4) of title 33 includes the nonappropriated fund instrumentalities described by section 2105(c) of this title.

(c) The Secretary of Labor may —

(1) extend compensation districts established under section 939(b) of title 33, or establish new districts to include the areas outside the continental United States; and

(2) assign to each district one or more deputy commissioners as the Secretary considers advisable.

(d) Judicial proceedings under sections 918 and 921 of title 33 with respect to an injury or death occurring outside the continental United States shall be instituted in the district court within the territorial jurisdiction of which is located the office of the deputy commissioner having jurisdiction with respect to the injury or death.

§ 8173.

The liability of the United States or of a nonappropriated fund instrumentality described by section 2105(c) of this title, with respect to the disability or death resulting from injury, as defined by section 902(2) of title 33, of an employee referred to by sections 8171 and 8172 of this title, shall be determined as provided by this subchapter. This liability is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the disability or death in a direct judicial proceeding, in a civil action, or an admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute.

28 USC 1257(a)

§ 1257.

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

33 USC 901

§ 901.

This chapter may be cited as "Longshore and Harbor Workers' Compensation Act."

33 USC 905(a)

§ 905.

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on acount of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury

was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

40 U.S.C 290

§ 299.

Whatsoever constituted authority of each of the several states is charged with the enforcement of and requiring compliances with the state workmen's compensation laws of said states and with the enforcement of and requiring compliance with the orders, decisions and awards of said constituted authority of said states shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any state and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any state, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the state within whose exterior boundaries such place may be.

For the purposes set out in this section the United States of America vests in the several states within whose exterior boundaries such place may be, insofar as the enforcement of state workmen's compensation laws are affected, the right, power, and authority aforesaid: Provided, however, That by the passage of this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the properly named, with the exception of extending to the several states within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their state workmen's compensation laws as herein designated: Provided further, That nothing in this Act shall be construed to modify or amend sections 751-756, 757-181, 783-791 and 793 of Title 5 [United States Employees' Compensation Act]. (As amended June 25, 1936, c. 822, §§ 1, 2, 49 Stat. 1938, 1939.)

CALIFORNIA LABOR CODE 3209

§ 3209.

"Damages" means the recovery allowed in an action at law as contrasted with compensation.

CALIFORNIA LABOR CODE 3602

§ 3602.

(a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer. and the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer.

(b) An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply, in the following instances:

(1) Where the employee's injury or death is proximately caused by a wilful physical assault by the employer.

(2) Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation thereof is upon the employer.

(3) Where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's case by a third person.

(c) In all cases where the conditions of compensation set forth in Section 3600 do not concur, the liability of the employer shall be the same as if this division had not been enacted.

APPENDIX B-1

FOURTH APPELLATE DISTRICT
DIVISION THREE, NO. G014492
S033931

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

FOUAD A. MIKHAIL,
Petitioner

v.

WORKERS' COMPENSATION APPEALS BOARD,
Respondent.

Petition for review DENIED.

APPENDIX C-1

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FOUAD A. MIKHAIL,
Petitioner

v.

WORKERS' COMPENSATION APPEALS BOARD, et al.,
Respondents.

ORDER G014492
(WCAB Case No. ANA 221387)

THE COURT:*

The petition for a writ of review is DENIED.

SILLS, P.J.

Sills, Presiding Justice

*Before Sills, P.J., Crosby, J., and Moore, J.

THE ENCLOSED INFORMATION REGARDING CASE NUMBER G014492 HAS BEEN SENT TO THE FOLLOWING:

George & Waltemade
Waltemade, Fred
770 The City Drive South, Suite 3000
Orange, CA 92668

Workers' Compensation Appeals Board
P.O. Box 6759
San Francisco, CA 94101

Workers' Compensation Appeals Board
28 Civic Center Plaza, Room 451
Santa Ana, CA 92701

GAB Business Services
9370 Skypark Center, #140
San Diego, CA 92123

Guzman, Gretchen
621 Sandpiper Drive
Seal Beach, CA 90740

U.S. Marine Corps Exchange
MWR 0230
P.O. Box 5010
El Toro, CA 92630

Office of the County Clerk
Orange County
700 Civic Center Drive West
Santa Ana, CA 92701

APPENDIX D-1

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FOUAD A. MIKHAIL,
Applicant,

vs.

U.S. MARINE CORPS EXCHANGE;
GAB BUSINESS SERVICES,
Defendants,

Case No. ANA 221387

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant, Fouad A. Mikhail, seeks reconsideration of the Findings of Fact issued by a workers' compensation judge (WCJ) on March 15, 1993, in which the WCJ found that the Board does not have jurisdiction to consider applicant's claim of industrial injury. Applicant contends that the Board's jurisdiction over this matter is concurrent with federal jurisdiction and that "damages" as used in NAFI section 8173 does not include benefits provided by California workers' compensation law.

Applicant, an auto mechanic was injured as the result of an electric shock on May 13, 1988. At the time of injury, applicant was employed as a mechanic by the U.S. Marine Corps Exchange in El Toro, California. On June 9, 1989, applicant filed a claim for benefits under California workers' compensation law. Defendant filed a Petition for Dismissal for Lack of Jurisdiction, alleging that there was exclusive federal jurisdiction over this matter, pursuant to the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. section 901, et seq., as extended by the Non-Appropriated Fund Instrumentalities Act (NAFI), 5 U.S.C. 2105, 8171, et seq.

The matter was heard on December 11, 1992, on the sole issue of jurisdiction. Applicant testified that he has lived in California since 1974; that he applied for, was tested for, and was hired for his position by defendant on the military base in California in 1986 or 1987; that his employer was the U.S. Marine Corps Exchange; and that he was paid by the U.S. Marine Corps Exchange. After his injury, he received some benefits which were paid from NAFI. After the filing of additional legal argument, the matter stood submitted. The WCJ found that the United States Congress had expressly provided that liability under NAFI was exclusive. It is from this finding that applicant seeks relief.

At issue in this matter is the remedy provided by the "Act to Make the Provisions of the Longshoremen's and Harbor Workers' Compensation Act Applicable to Certain Civilian Employees of Nonappropriated Fund Instrumentalities of the Armed Forces." (5 U.S. Code §§ 2105, 8171-8173). NAFI is specifically applicable to employees paid from nonappropriated funds of Marine Corps exchanges (5 U.S. Code § 2105). It is undisputed that applicant was paid from such funds and that NAFI is therefore applicable to this matter.

Section 8173 provides:

> "Liability Under this Subchapter Exclusive. The Liability of the United States or a nonappropriated fund instrumentality described by section 2105(c) of this title, with respect to the disability or death resulting from injury, as defined by section 902(2) of title 33, of an employee referred to by sections 8171 and 8172 of this title, shall be determined as provided by this subchapter. *This liability is exclusive and instead of all other liability* of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the disability or death in a direct judicial proceeding, in a civil action, or an admiralty, or *by judicial proceeding under a workmen's compensation statute* or under a Federal tort liability statute." (Italics added.)

The language of section 8173 is clear. Liability under NAFI is exclusive. The alternative language contained in the phrase "by judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute," indicated that both state and federal potential remedies for compensable injuries are contemplated under this section. Section 8173, in its entirety, provides that, notwithstanding other possible forums for determining liability for an injury, jurisdiction to find and assess liability shall be solely had pursuant to LHWCA and not under a state's workers' compensation laws. The WCJ correctly found that federal jurisdiction was exclusive in this case. Accordingly, we affirm the finding and will deny the petition for reconsideration.

With regard to applicant's contention that the word "damages" as used in section 8173 is different than the remedies provided by the workers' compensation law of this state, we note that we are not persuaded that this difference, if any, forms a basis for concurrent jurisdiction. Section 8173 clearly indicates that it preempts state jurisdiction under a workmen's compensation statute without making any reference to the possible remedies available under the workers' compensation laws of the several states. Section 8173 is the exclusive remedy for any recovery of compensation for an injured worker.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration filed April 2, 1993, be, and it hereby is, DENIED.

WORKERS' COMPENSATION APPEALS BOARD

ARLENE N. HEATH

I CONCUR,
RICHARD P. GANNON

JOHN S. ODA

DATED AND FILED AT SAN FRANCISCO,
CALIFORNIA
JUNE 1, 1993
SERVICE BY MAIL OF SAID DATE TO ALL PARTIES
LISTED ON THE OFFICIAL ADDRESS RECORD

APPENDIX E-1

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FOUAD A. MIKHAIL,
vs.
U.S. MARINE CORPS. EXCHANGE;
GAB BUSINESS SERVICES
Case No. ANA 221387

FINDINGS OF FACT

George and Waltemade, by Fred Waltemade, Attorneys for Applicant

Gretchen Guzman, Attorney for Defendant

Hearing having been held, all parties have appeared, and the matter having been regularly submitted for decision, the Honorable KENNETH D. CUSHMAN, Workers' Compensation Judge, makes his Findings of Fact as follows:

FINDINGS OF FACT

1. It is hereby found that pursuant to the provisions of the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171, et seq., Congress has expressly provided that liability under the Act is exclusive. Therefore, this Board lacks jurisdiction in the above-entitled matter.

KCC/tjw
Dated: March 15, 1993

KENNETH C. CUSHMAN
Kenneth C. Cushman, Judge

Service by mail on parties shown
on the Official Address Record.
by: TERESA J. WHITNEY

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

WORKERS' COMPENSATION APPEALS BOARD

FOUAD A. MIKHAIL,
Applicant,

v.

U.S. MARINE CORPS EXCHANGE,
GAB BUSINESS SERVICES,
Defendants.

Case No. 89 ANA 221387

MINUTES OF HEARING
AND
SUMMARY OF EVIDENCE

Place & Time:	Santa Ana, California December 11, 1992 — 9:00 A.M.
Judge:	KENNETH C. CUSHMAN
Reporter:	Ruby J. Smith, CSR 2551
Appearances:	Applicant, Fouad A. Mikhail GEORGE & WALTEMADE By: FRED WALTEMADE Attorneys for Applicant GRETCHEN GUZMAN Attorney for Defendant ART MILAN, Representative for Lien Claimant, The 4600 Group HISHAM MALEK, Arabic Interpreter
Witnesses:	Applicant

STIPULATIONS:

1. Applicant, Fouad A. Mikhail, born August 11, 1932, while employed as an Auto Mechanic, on May 13, 1988, at El Toro, California, claims to have sustained an injury arising out of and

occurring in the course of employment to his spine, extremities, nervous system, and psyche.

ISSUES:

1. Jurisdiction.

EXHIBITS:

Applicant's 1:	Applicant's Trial Brief dated October 27, 1992.
Defendant's A:	Defendant's Trial Brief dated December 4, 1992.
Disposition:	The parties are allowed 30 days to file additional supplemental Trial Briefs, as needed.
	Otherwise, the matter will stand submitted, and the parties are ordered to obtain copies of applicant's paychecks from the U.S. Marine Exchange, if possible.

SUMMARY OF EVIDENCE

APPLICANT was called, sworn, and testified through an Arabic interpreter substantially as follows:

DIRECT EXAMINATION:

His present address is 1514 South Oak in Santa Ana. His primary language is Arabic. He found out about the job at the Marine Exchange through the L.A. Times and a friend. He has lived in California since 1974.

He was hired at the Exchange in 1986 or 1987. At that time, he filled out an application, took a test, passed the test, and was hired. He indicated that all his work at the Exchange was done on the base at El Toro.

CROSS-EXAMINATION

He filled out an application and took the test at the Marine Corps Exchange. He took the test on the base at El Toro. He was working on the base on May 13, 1988 when he sustained his injury. His employer was the U.S. Marine Corps Exchange. He was paid by the U.S. Marine Corps Exchange.

After his injury, he received some benefits from the Marine Exchange. He stated that he was paid from the Non-Appropriated Funds Act.

REDIRECT EXAMINATION:

The checks were issued by the Marine Exchange and that they were not treasury checks.

KENNETH C. CUSHMAN,
Workers' Compensation Judge

Dict: 12-11-92
Typed: 12-15-92

APPENDIX F-1

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

WORKERS' COMPENSATION APPEALS BOARD

SEE REVERSE SIDE
FOR INSTRUCTIONS

CASE No. 89 AR 221387

APPLICATION FOR ADJUDICATION OF CLAIM
(PRINT OR TYPE NAMES AND ADDRESSES)

Mr. Fouad Mikhail	1514 S. Oak St.
	(CLAIMED EMPLOYER'S ADDRESS AND ZIP CODE)
Social Security No.: 555-31-9423	SANTA ANA, CALIFORNIA 92707
(APPLICANT, IF OTHER THAN CLAIMED EMPLOYEE)	(APPLICANT'S ADDRESS AND ZIP CODE)
U.S. Marine Corps. Exchange	El Toro, CA
(EMPLOYER — STATE OF SELF ???)	(EMPLOYER'S ADDRESS AND ZIP CODE)
General Adjusting Bureau	2605 Camino Del Rio So., #401
(??????????????????)	(??????????????????)
	San Diego, CA 92108

IT IS CLAIMED THAT:

1. The injured employee, born 8/11/32 (DATE OF BIRTH), while employed as a Auto Mechanic (OCCUPATION AT TIME OF ??)
   on 5/13/88 (DATE OF INJURY) at El Toro, Ca (ADDRESS) (CITY) (STATE) (ZIP CODE)
   By the employer sustained injury arising out of and in the course of employment to spine, extremities, nervous system & psyche (STATE WHAT)
2. The injury occurred as follows: Electric Shock (Explain what employee was doing at time of injury and how injury was incurred)
3. Actual earnings at time of injury were: Maximum (???)
   (??????????????????)
4. The injury caused disability as follows: Continuing (??????????????????)
5. Compensation was paid X ___ $_____ (???) $_____ (???) _____ (???)
6. Unemployment insurance or unemployment compensation disability benefits have been received since the date of injury ___ X (YES) (NO)
7. Medical treatment was received X (YES) ___ (NO) _____ (DATE OF LAST TREATMENT)

All treatment was furnished by the Employer or Insurance Company ___ (YES) ___ (NO)

Other treatment was provided or paid for by Self procured (???)

Did Medi-Cal pay for any health care related to this claim ___ (YES) X (NO)

doctors not provided or paid for by employer or insurance company who treated or examined for this injury are ___ (???)

8. Other cases have been filed for industrial injuries by this employee as follows: OWCP-18-38006 (???)

9. This application is filed because of a disagreement regarding liability for:
Temporary disability indemnity XX Permanent disability indemnity XX
Reimbursement for medical expense XX Medical treatment XX
Compensation at proper rate XX Rehabilitation XX
Other (Specify) All benefits under the California Labor Code. (???)

Dated at Orange, , California 6/6/89 STATE

By: FRED WALTEMADE APPLICANT'S SIGNATURE

FOUAD MIKHAIL APPLICANT'S SIGNATURE

Fred Waltemade
770 The City Drive So., #3000
Orange, CA 92668
714-750-1010

June 15, 1989

The Workers' Compensation Appeals Board
28 Civic Center Plaza, Suite 451
Santa Ana, California 92701

RE: EMPLOYEE: FOUAD MIKHAIL
EMPLOYER: U.S. MARINE CORPS EXCHANGE
OWCP NO.: 18-038006
DOI: 5/13/88

Gentlemen:

Enclosed for filing you will find Petition For Dismissal For Lack of Jurisdiction. We would respectfully request that the Court act upon this Petition without the need for an appearance by the employer's representative.

Yours very truly,

LAUGHLIN, FALBO, LEVY & MORESI

GRETCHEN GUZMAN

GG:ew
cc: Mr. Michael Kilpatrick/GAB, Inc.

GRETCHEN GUZMAN
LAUGHLIN, FALBO, LEVY & MORESI
300 Oceangate, Suite 600
Long Beach, CA 90102
Telephone No. (2132) 495-3711
ATTORNEY FOR EMPLOYER

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

FOUAD MIKHAIL
Applicant,
vs.
U.S. MARINE CORPS EXCHANGE; GAB BUSINESS SERVICES, INC.
Employer,

CASE NO. 18-038006

PETITION FOR DISMISSAL FOR LACK OF JURISDICTION

COME NOW the petitioners U.S. MARINE CORPS EXCHANGE and GAB BUSINESS SERVICES, INC. and submit the following Memorandum of Points and Authorities in support of their Petition for Dismissal for Lack of Jurisdiction.

I

INTRODUCTION

The applicant, Fouad Mikhail, was employed as a mechanic by the U.S. Marine Corps Exchange in El Toro, California when he alleges numerous injuries arising out of and occurring in the course of his employment.

The applicant has filed an Application of Adjudication of Claim before the Workers' Compensation Appeals Board and a Claim for Compensation seeking benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, et. seq. (hereinafter referred to as the "LHWCA"). The benefits provided in the LHWCA are extended to the applicant in the

instant case under The Non-Appropriated Fund Instrumentalities Act, 5 U.S.C., Section 8171, et. seq. (hereinafter referred to as "NAFI"). NAFI extends the benefits of the LHWCA to employees of non-appropriated fund instrumentalities such as the Marine Corps Exchange, employer herein.

II

QUESTION PRESENTED

Did the injury in the instant case occur while the applicant was in a "twilight zone" engaged in an activity covered by both state compensation laws in the LHWCA, or is federal jurisdiction over the injury in the instant case exclusive?

III

THE INJURY IN THE INSTANT CASE WAS NOT MARITIME BUT LOCAL IN NATURE. THERE IS NO CONCURRENT STATE-FEDERAL JURISDICTION. FEDERAL JURISDICTION IS EXCLUSIVE.

The modern view of the twilight zone rests on the United States Supreme Court's decision in *Sun Ship v. Pennsylvania* (1980) 447 US 715, 100 S. Ct. 243. In *Sun Ship*, the Court held that nothing in the 1972 amendments to the LHWCA was intended to supplant state compensation law. Thus, the Court concluded; (1) a state could apply its state compensation laws to land based injuries that fell under the coverage of the LHWCA and; (2) — concurrent state-federal jurisdiction could exist where the injury was "maritime but local" in nature.

Two California Appellate Court decisions, *Huong Duong v. WCAB* (1985) 169 Cal. App. 3d 980, 215 Cal. Rptr. 609 and *Bobbit v. WCAB* (1983) 143 Cal. App. 3d 834, 192 Cal. Rptr. 267, have relied on the above theories to define concurrent state and federal jurisdiction in California.

In *Huong Dong*, cited supra, the Court of Appeal held that injuries incurred by a land based shipyard worker while making

minor repairs on a commissioned vessel floating in federal navigable waters, but tied to a dock, occurred while he was in a "twilight zone" thus he was engaged in an activity covered by both state compensation laws and the LHWCA.

Bobbitt, supra, did not involve a "land based" injury. The employee therein, a derrick hand was injured on a stationary oil drilling platform, eight miles from the state coastline. The injury was therefore covered by the Outercontinental Shelf Land Act, 43 U.S.C. Section 1333 (hereinafter referred to as the OCSLA) whcih expressly extends the benefits of the LHWCA to injuries sustained on the outercontinental shelf. The *Bobbitt* Court first noted that the United States Supreme Court, in *Gulf Offshore Company v. The Mobile Oil Corp* (1981) 435 U.S. 101 S. Ct. 2870, held that the OCSLA did not preclude concurrent federal-state jurisdiction over actions for personal injuries occurring on the outercontinental shelf. Thus, the *Bobbitt* Court concluded, where California Labor Code Section 3600.5 extended compensation benefits to an employee injured in the course of his employment outside the State and the Supreme Court had ruled that federal jurisdiction under the OCSLA was not exclusive, the Board would have concurrent jurisdiction over claims arising on the outercontinental shelf. *Bobbitt, supra,* 192 Cal. Rptr. 267, 268-269.

Considering the foregoing, California may apply its compensation laws to injuries that also fall within the coverage of the LHWCA where (1) the injury is maritime but local in nature and, (2) federal jurisdiction is not exclusive. In these circumstances, concurrent state-federal jurisdiction may exist and an employee may file claims under both the California State Compensation Act and the LHWCA.

In the instant case, there is nothing "maritime" about the nature of the applicant's injury. Moreover, and most importantly, both the applicable federal statute and the California Courts have declared that *federal jurisdiction is exclusive* and state compensation laws may not be applied where, as here, the applicant was an employee of a military exchange and was injured on a military reservation.

IV

UNDER THE NON-APPROPRIATED FUNDS INSTRUMENTALITIES ACT AND THE DECISIONS OF THE CALIFORNIA COURTS, FEDERAL JURISDICTION IN THIS MATTER IS EXCLUSIVE AND CALIFORNIA'S WORKERS' COMPENSATION LAWS MAY NOT BE APPLIED.

Compensation in the instant case is controlled by the NAFI which was enacted by Congress to provide compensation coverage for employees working on U.S. military bases who were not paid with funds appropriated by Congress. It extends the benefits of the LHWCA to all persons "... paid from non-appropriated funds of the Army and Air Force exchange service ... Marine Corps Exchanges ... Army and Air Force exchange service ... Marine Corps Exchanges ... and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment and mental and physical improvement of personnel of the armed forces ..." 5 U.S.C. Section 2105 (c), also see 5 U.S.C. Section 8171 (a).

The NAFI further states that liability under the Act;

> ... it is *exclusive* and instead of all other liability of the United States or the instrumentality to the employee ..., and any other person otherwise entitled to recover damages for the United States or the instrumentality because of the disability or death in a direct judicial proceeding, in a civil action, or in admiralty *or by an administrative or judicial proceeding under a workers' compensation statute* or under a federal court liability statute." (Emphasis added)

In Gulfshore Company v. the Mobile Oil Corp., supra, relied upon by California Appellate Court in *Bobbitt* for a finding of concurrent disability on a claim arising under the OCSAL, the United States Supreme Court stated:

> "The general principal of state court jurisdiction over cases arising under federal law is straightforward:" state courts may assume subject matter jurisdiction over a federal cause of action, absent provision by Congress to the contrary. In

> considering the propriety of the state court jurisdiction over any particular federal claim, the Court begins with the presumption that State Courts enjoy concurrent jurisdiction. (citation omitted) Congress, however, may confine jurisdiction to the Federal Courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive . . ." 101 S. Ct. at 2875

Under the NAFI, there is an "explicit statutory directive" that the liability of the instrumentality under the Act shall be exclusive and instead of all other liability including "an administrative or judicial proceeding under a workers' compensation statute." Federal jurisdiction in the instant case, by the express terms of the applicable statute, is exclusive.

Moreover, the California Courts have expressly stated that where a contract of employment was made, the work was performed, and the injury was received on a military reservation of the United States located in California, the Industrial Accident Commission is without jurisdiction of a proceeding for compensation because California has specifically given exclusive jurisdiction over military reservations to the United States. *Martin v. Clinton Construction Company* (1940) 41 Cal. App. 2d 35, 105 P. 2d 1029, 1034-1035; also see California Government code Section 110.

V

CONCLUSION

The injury alleged in the instant case occurred on a military reservation by an employee of a non-appropriated fund instrumentality and therefore may be compensated under the LHWCA according to the provisions of the NAFI. Federal jurisdiction under the NAFI is exclusive and the Workers' Compensation Appeals Board is without jurisdiction over this proceeding. The concurrent state-federal jurisdiction which normally may exist for land based injuries that fall within the coverage of the LHWCA does not apply in the instant case. The applicant's injury did not occur within a "twilight zone" and his claims made under the California State Compensation Act should be dismissed.

Respectfully Submitted,

Dated: June 16, 1989

LAUGHLIN, FALBO, LEVY & MORESI

BY: GRETCHEN GUZMAN

GRETCHEN GUZMAN,
Attorney for Employer

APPENDIX H-1

GEORGE & WALTEMADE
LAW OFFICES
770 THE CITY DRIVE SOUTH
SUITE #3000
ORANGE, CA 92668
(714) 740-2009

Attorneys for applicant.

BEFORE THE WORKER'S COMPENSATION
APPEALS BOARD
OF THE STATE OF CALIFORNIA

FOUAD A. MIKHAIL,
Applicant.
VS.
U.S. MARINE CORPS EXCHANGE,
GAB BUSINESS SERVICES
Defendant.

WCAB NO: ANA 221387

TRIAL MEMORANDUM RE:
JURISDICTION OF CALIFORNIA STATE
WORKER'S COMPENSATION APPEALS BOARD

Applicant was injured working for U.S. Marine Corps Exchange at El Toro, a Federal Non-Appropriated Fund Activity. This case is set for hearing on whether there is California jurisdiction concurrent with the Federal Non Appropriated Fund Instrumentalities Act (NAFI) 5 USC 8171 et seq. NAFI Act language at issue is 5 USC 8173:

> Liability Under This Subchapter Exclusive. The Liability of the United States or a nonappropriated fund instrumentality described by section 2105(c) of this title, with respect to the disability or death resulting from injury, as defined by section 902(2) of title 33, of an employee referred to by this sections 8171 and 8172 of this title, shall be determined as provided by this subchapter. This liability is exclusive and instead of all other liability of the United States or the

> instrumentality to the employee, his legal representative, spouse, dependants, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the disability or death in a direct judicial proceeding in a civil action, or an admiralty, or by administrative or judical proceeding under a workermen's compensation statute or under a Federal tort liability statute.

The key word in that statute which supports concurrent California jurisdiction is "damages." Ask any applicant who has had to endure his attorney's lecture about the abolition of "damages" and the substitution therefor of "compensation" under the California workers compensation system, Labor Code Section 3602, and that is an applicant who will be able to answer that he has learned the bitter lesson that both "damages" and "compensation" are terms of art.

Key elements of "damages" are lost earnings, projected lost future earnings, and pain and suffering; all of which are wiped out by California workers "compensation."

NAFI Act, 5 USC 8173 specifically and solely provides that it is exclusive and instead of liability for "damages". The California workers compensation act Labor Code Section 3209 defines "damages" and contrasts it with the totally different concept of "compensation." Labor Code Section 3602 then specifically excludes any claim for "damages" against an employer, and provides that "compensation" is the sole remedy.

Additionally, 40 USC 290 extends jurisdiction of state workers compensation to federal reservations, except for *appropriated fund federal employees,* who are covered by the therein recited section of the *US Employers Compensation Act.* 40 USC 290 reads as follows:

> Whatsoever constituted authority of each of the several states is charged with the enforcement of and requiring compliances with the state worker's compensation laws of said states and with the enforcement of and requiring compliance with the orders, decisions and awards of said constituted authority of said states shall have the power and authority to apply such laws to all lands and premises owned

or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any state and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any state, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the state within whose exterior boundaries such place may be.

For for purposes set out in this section the United States of America vests in the several states within whose exterior boundaries such place may be, insofar as the enforcement of state worker's compensation laws are effected, the right, power, and authority aforesaid: Provided, however, That by the passage of this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several states within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their state workmen's compensation laws as herein designated: Provided further, That nothing in this Act shall be construed to modify or amend sections 751-756, 757-181, 783-791 and 793 of Title 5 (United States Employees' Compensation Act]. (As amended June 25, 1936, c. 822, SS1, 2, 49 Stat. 1938, 1939.)

Since the enactment of NAFI Act, 40 USC 290 has never been amended to *exclude* NAFI employees from its applicability.

Construing 40 USC 290, 5 USC 8171 (a) and California Labor Code Sections 3602 and 3209 in harmony, the obvious reading of "damages" in 8171(a) is as the term of art that it is, and recognizing that what is being protected against is *only* any court or administrative board awarding hug damage awards for lost earnings, future earnings, and pain and suffering. This construction thereby reconciles 5 USC 8171(A) with Cal LC 3206, 3209 and 40 USC 290. It should be noted that an old California case cited by defendant in defendant's jurisdiction petition of June 16, 1989, *Martin vs. Continential Casualty* 5 CCC 286 (1940) is

demolished by 40 USC 290. The Martin injury occurred in 1935, prior to 40 USC 290. See the *Martin* case editor's note at 292.

Besides this direct approach construing the "damages" language of NAFI Act in harmony with Cal LC 3206, 3209 and 40 USC 290, there is another route by which state jurisdiction can be arrived at under NAFI Act. There is The *Sun Ship vs. Pennsylvania* case, 447 US 715 (1980). That case interprets the L&H act to provide for concurrent jurisdiction of state workers compensation acts and liability under those acts, and has made such concurrent jurisdiction and liability part and parcel of the L&H act.

That very L&H Act is incorporated into NAFI as follows: (To aid in this analysis, a copy of the NAFI Act is attached as Exhibit A.) Section 8173 of NAFI Act says *"liability"* of the U.S. or a NAFI shall be determined "as provided by this subchapter." "This subchapter" reference is to section 8171, which contains the language applying the L&H statue to NAFI's. Section 8173 then goes on to say that "*this liability* is exclusive "etc. The phrase *this liability* modifies and is derivative of the reference to "*liability*" in the preceding sentence. The "*exclusive*" term in NAFI Act Section 8173 refers to "*this liability*," and must necessarily therefore refer to liability as provided under L&H and *Sun Ship*, which includes concurrent state jurisdiction. Therefore, "liability" is to be determined pursuant to the L&H Act, as interpreted by the courts, including the *Sun Ship* case which incorporates the concept of concurrent jurisdiction for covered employers and employees. Since the extension of the L&H act to the NAFI's thus makes then covered employees, all references in Sun Ship to maritime employment, also necessarily means NAFI employment.

The question arises, if California thus *may* exercise concurrent jurisdiction, should this board *so* exercise concurrent jurisdiction pursuant to California Court decisions. The answer is "yes". California in *Bobbitt v WCAB*, 143 CAL APP. 3rd 384, (1983) has indicated it *will* exercise concurrent jurisdiction where it may. Here, California has very strong interests in seeing that concurrent jurisdiction for NAFI employees is upheld. In many respects, California law is more employee oriented than L&H. California

law is such because it is policy to have injured workers enabled to prove their cases by the liberal med-legal rules, and to have workers vocationally rehabilitated to productivity by mandatory vocational rehabilitation at employer's expense.

L&H has neither. Therefore some industrially injured employees, under L&H rules, will not be able to prove their cases and some will not get rehabilitation. Either way, they will become public charges of this state without the exercise of concurrent jurisdiction. And perhaps the strongest policy of this state in its workers compensation scheme is that employers be responsible for injured workers compensation, not the California county welfare departments and Medi-Cal.

Before these employees went to work for NAFI's they were Californians; post injury they are still Californians, and they will continue to be Californians. They should be able to use the resources of California law to prove up their injuries, and it is beneficial both to them and to the State of California for them to be able to do so.

Applicant's testimony as to how applicant's present economic situation demonstrates the interests of California is the sole issue upon which evidence will be submitted at the upcoming hearing.

Perhaps the only remaining jurisdiction issue is sovereign immunity. If there ever were an issue of sovereign immunity it would no longer be an issue in light of *Sun Ship* combined with 40 USC 290. However, case review would indicate that there was no such problem even *before Sun Ship. Rizzutto vs. U.S., 298 F2D 748(1961), footnote 7.*, reveals that a NAF case was filed and adjudicated under Wyoming workers compensation law in the Wyoming courts, with the NAF law in effect prior to the present statute. Additionally, legislative history of the current NAFI act indicates no sovereign immunity problem; rather that the problem was that state courts were *declining* to hear such cases, although they could if they wanted to. The Senate Post Office and Civil Service Committee report on the bill states:

> "The law provides that such employees (NAF) "shall not be held and considered as employees of the United States for the purpose of the Federal Employees Compensation Act."

> Ordinarily, in these circumstances, the claims of such employees would be adjudicated by the State Compensation commissions. However, the State compensation commissions have declined jurisdiction on the ground that such employees are employed by instrumentalities of the Federal Government.") (*U.S. code Congressioral and Administrative New, Legislative History*, 85th Congress, 1958, pg 3085.)

It should be noted that only *some* State commissions were declining jurisdiction, as the Wyoming *Rizzuto* case shows.

CONCLUSION:

Based on the foregoing, and the forthcoming testimony of applicant as to the effect upon California interests, this court should conclude that the only appropriate conclusion here is that there is concurrent California jurisdiction, and, following hearing on this sole issue of jurisdiction on December 11, 1992, should set the case over for trial on all other issues.

Respectfully submitted,

GEORGE & WALTEMADE

DATE: OCTOBER 27, 1992 BY: FRED WALTEMADE, ESQ.

EXHIBIT A

§ 1333. Laws Applicable to Outer Continental Shelf.

(b) With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the prupose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section —

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

ACT TO MAKE THE PROVISIONS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT APPLICABLE TO CERTAIN CIVILIAN EMPLOYEES OF NONAPPROPRIATED FUND INSTRUMENTALITIES OF THE ARMED FORCES

(5 U.S. Code 2105, 8171–8173; formerly 150k, 150k-I)

§ 2105. Employee.

(c) Any employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction

of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of —

(1) laws (other than subchapter IV of chapter 53 and sections 5550 and 7204 of this title) administered by the Office of Personnel Management; or

(2) subchapter 1 of chapter 81, chapter 84, [Federal Employees' Compensation Act] and section 7902 of this title.

This subsection does not affect the status of these nonappropriated fund activities as Federal instrumentalities.

§ 8171. Compensation for Work Injuries; Generally. (a) Chapter 18 of title 33 [Longshoremen's and Harbor Workers' Compensation Act] applies with respect to disability or death resulting from injury, as defined by section 902(2) of title 33, occurring to an employee of a nonappropriated fund instrumentality described by section 2105(c) of this title who is —

(1) a United States citizen or a permanent resident of the United States or a territory or possession of the United States employed outside the continental United States; or

(2) employed inside the continental United States.

However, that part of section 903(a) of title 33 which follows the first comma not apply to such an employee.

(b) For the purpose of this subchapter, the term "employer" in section 902(4) of title 33 includes the nonappropriated fund instrumentalities described by section 2105(c) of this title.

(c) The Secretary of Labor may —

(1) extend compensation districts established under section 939(b) of title 33, or establish new districts to include the areas outside the continental United States; and

(2) assign to each district one or more deputy commissioners as the Secretary considers advisable.

(d) Judicial proceedings under sections 918 and 921 of title 33 with respect to an injury or death occurring outside the continental United States shall be instituted in the district court within the

territorial jurisdiction of which is located the office of the deputy commissioner having jurisdiction with respect to the injury or death.

§ 8172. Employees Not Citizens or Residents of the United States. In case of disability or death resulting from injury, as defined by section 902(2) of title 33, occurring to an employee of a nonappropriated fund instrumentality described by section 2105(c) of this title who is —

(1) not a citizen or permanent resident of the United States or a territory or possession of the United States; and

(2) employed outside the continental United States; compensation shall be provided in accordance with regulations prescribed by the Secretary of the military department concerned and approved by the Secretary of Defense or regulations prescribed by the Secretary of the Treasury, as the case may be.

§ 8173. Liability Under This Subchapter Exclusive. The liability of the United States or a nonappropriated fund instrumentality described by section 2105(c) of this title, with respect to the disability or death resulting from injury, as defined by section 902(2) of title 33, of an employee referred to by section 8171 and 8172 of this title, shall be determined as provided by this subchapter. This liability is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States of the instrumentality because of the disability or death in a direct judicial proceeding, in a civil action, or an admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute.

COMPENSATION ACT FOR EMPLOYEES OF CONTRACTORS OF THE UNITED STATES OUTSIDE THE UNITED STATES

*(42 U.S. Code 1701-1717)**

§ 1701. Benefits and Persons Eligible. (a) Injury or death. — In case of injury or death resulting from injury —

(1) to any person employed by a contractor with the United States, if such person is an employee specified in the Act of August 16, 1941 (Public Law Numbered 208, Seventy-seventh Congress), as amended [42 U.S. Code 1651-1654], and no compensation is payable with respect to such injury or death under such Act; or

(2) to any person engaged by the United States under a contract for his personal services outside the continental United States; or

(3) to any person employed outside the continental United States as a civilian employee paid from non-appropriated funds administered by the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Store Ashore, Navy exchanges, Marine Corps exchanges, officers' and noncommissioned officers' open messes, enlisted men's club, service clubs, special service activities, or any other instrumentality of the United States under the jurisdiction of the Department of Defense and conducted for the mental, physical and morale improvement of personnel of the Department of Defense and their dependents; or

(4) to any person who is an employee specified in section 1(a)(5) of the Defense Base Act, as amended, if no compensation is payable with respect to such injury or death under such Act, or to any person engaged under a contract for his personal services outside the United States approved and financed by the United States under the Mutual Security Act of 1954, as amended (other than title II of chapter II thereof unless the

---

*Titles I and II of the Act of Dec. 2, 1942, Ch. 668, 56 Stat. 1028-1035, as amended.

Secretary of Labor, upon the recommendation of the head of any department or other agency of the United States Government, determines a contract financed under a successor provision of any successor Act should be covered by this section); Provided, That in cases where the United States is not a formal party to contracts approved and financed under the Mutual Security Act of 1954, as amended, the Secretary, upon the recommendation of the head of any department or agency of the United States, may, in the exercise of his discretion, waive the application of the provisions of this subparagraph with respect to any such contracts, subcontracts, or subordinate contracts, work location under such contracts, subcontracts, or subordinate contracts, or classification of employees; or

(5) to any person employed or otherwise engaged for personal services outside the continental United States by an American employer providing welfare or similar services for the benefit of the Armed Forces pursuant to appropriate authorization by the Secretary of

(VERIFICATION - 446 and 2015.5 C.C.P.)

STATE OF CALIFORNIA, COUNTY OF _____

I, the undersigned, declare: I am the _____

_____

in the above-entitled action: I have read the foregoing _____

_____

and know the contents thereof; and the same is true of my own knowledge, except as to the matters which are therein stated upon my information and belief, and as to those matters, I believe it to be true.

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ _____
Date Signature of Declarant

_____
Type or Print Full Name of Declarant and Title, if applicable

(PROOF OF SERVICE BY MAIL-1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am a resident of/employed in the aforesaid county, State of California; I am over the age of eighteen years and not a party to the within action; my business address/residence address is: _____

770 The City Drive South, #3000, Orange, CA 92668

On 10/27/92 *, 19*_____ *I served the foregoing* Trial Memorandum

Re: Jurisdiction Of California State Workers Comp Appeals Board.

(???? forth the exact title of the ????? ?????)

On the interested party(ies)

In this action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Orange, *California, addressed as follows:*

WCAB/28 Civic Center Pl. Santa Ana, CA 92701
L/O Gretchen Guzman/621 Sandpiper Dr. Sela Bch, CA 90740
GAB/9370 Skypark Ct. #140, San Diego, CA 92123

I certify (or declare), under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

10/27/92 IRMA C. OLIMAN
Date Signature of Declarant

Irma C. Oliman
Type or Print Full Name of Declarant